

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

MICHELLE FLINK,  
Plaintiff and Appellant,

v.

PACIFIC SPECIALTY INSURANCE  
COMPANY,  
Defendant and Respondent.

A096654

(Santa Clara County  
Super. Ct. No. CV772398)

Plaintiff and appellant Michelle Flink (appellant) appeals from a summary judgment that she shall take nothing from her complaint against defendant and respondent Pacific Specialty Insurance Company (respondent) for breach of insurance contract and breach of covenant of good faith and fair dealing. The complaint also alleged causes of action for negligent misrepresentations and negligence against appellant's insurance agent Ray Cuevas and the agent's employer Robinson Select Insurance Services. These agents entered into a settlement with appellant and are not part of this appeal.

The basis for the summary judgment was that respondent had properly cancelled its automobile insurance policy (policy) with appellant before the date of the motor vehicle accident giving rise to claims against appellant. A motion for reconsideration filed by appellant was denied. Appellant contends that respondent failed to comply with

the requirements of the Insurance Code and policy for cancellation due to nonpayment of a premium, because it did not give proper notice to a lienholder. We affirm.

## **I. STATEMENT OF UNDISPUTED FACTS AND PROCEEDINGS**

Appellant's complaint alleged as follows. On October 7, 1997, appellant was involved in an automobile accident and claims were asserted against her. At the time of the accident she was covered by a policy of automobile insurance issued by respondent. Instead of accepting responsibility for the claims and defending appellant, respondent claimed that the policy had been cancelled due to nonpayment of the premium. Respondent's attempted cancellation was defective and not in accordance with California notice requirements. The refusal to indemnify or defend appellant was a breach of an insurance contract and a breach of the covenant of good faith and fair dealing.

The parties agree to the following in their respective statements of undisputed material facts or other documents submitted with regard to respondent's motion for summary judgment.

On February 7, 1997, appellant purchased the subject automobile collision comprehensive and liability insurance policy from respondent. Under the heading "**Cancellation or Non-Renewal**," the policy provided in pertinent part: "(c) After your original policy has been in effect 60 days, we will not cancel . . . coverage during the policy term unless: [¶] (1) The premium is not paid when due. Notice of cancellation will be at least 10 days before cancellation takes effect; [¶] . . . [¶] (e) If we cancel the policy, our mailing or giving of notice to your address shown in the declarations will constitute proof of notice as of the date we mail it."

The lienholder named on the applications and/or declarations page of the policy is Ford Credit Titling Trust (FCTT). Under the heading "**Loss Payable Clause**," the policy provided in pertinent part: "*With respect to the interest of the Lienholder named on Application and/or Declarations page, its successors and assigns, (hereafter called the Lienholder)* in its capacity as conditional vendor or Mortgagee or otherwise, in the

automobile insured under this policy, the Company agrees as follows . . . .” (Italics added.)

“1. Loss or damage, if any, to the automobile described in this policy shall be payable firstly to the Lienholder and secondly, to the Insured, as their interests may appear, provided nevertheless that upon demand by the Lienholder upon the Company for separate settlement the amount of said loss shall be paid directly to the Lienholder to the extent of its interest and the balance, if any, shall be payable to the Insured.

“2. The insurance under this policy as to the interest only of the Lienholder shall not be impaired in any way by . . . any breach of warranty or condition of this policy, or by any omission or neglect, . . . or because of the failure to perform any act required by the terms or conditions of this policy . . . by the insured or the Insured’s employees, agents or representatives; whether occurring before or after the attachment of this agreement, or whether before or after the loss . . . .

“3. In the event of failure of the Insured to pay any premium or additional premium which shall be or become due under the terms of this policy, the Company agrees to give written notice to the Lienholder of such non-payment of premium after sixty (60) days from and within one hundred and twenty (120) days after due date of such premium and it is a condition of the continuance of the rights of the Lienholder hereunder that the Lienholder when so notified in writing by the Company of the failure of the Insured to pay such premium shall pay or cause to be paid the premium due within ten (10) days following receipt of the Company’s demand in writing therefor. . . . If the Lienholder shall decline to pay said premium or additional premium, the rights of the Lienholder under this Loss Payable Clause shall not be terminated before ten (10) days after receipt of said written notice by the Lienholder.

“4. If the Company elects to cancel the policy in whole or in part for non-payment of premium, or for any other reason, the Company will forward a copy of the cancellation notice to the Lienholder at its office specified hereinafter concurrently with the sending of notice to the insured but in such case this policy shall continue in force for the benefit of the Lienholder only for ten (10) days after written notice of such cancellation is

received by the Lienholder. In no event, as to the interest only of the Lienholder, shall cancellation of any insurance under this policy covering the automobile described in this policy be effected at the request of the insured before ten (10) days after written notice of request for cancellation shall have been given to the Lienholder . . . .”

The loss payable clause of the policy contained five more numbered paragraphs. Each paragraph specified different aspects of the rights adhering to lienholders under the policy.

All the premiums were paid by appellant through June 29, 1997. Appellant was in the process of transferring coverage to a different vehicle when an “Insurance Premium Due Notice[;] Cancellation Notice if Premium Not Paid,” dated July 24 or 25, 1997, was mailed to, and received by, appellant.

The notice stated in pertinent part: “Invoice Date: 07/24/1997[;] [¶] Payment Due Date: 08/06/1997[;] [¶] Named Insured[:] [Appellant][;] [¶] . . . [¶] This is an offer to continue your insurance through [respondent] for the coverage period listed above [08/07/1997 to 09/07/1997 (12:01 A.M.)][;] [¶] Please pay the total amount due specified below. Partial payments will not be accepted. If the monthly payment amount [\$94.33] has not been received in our office by the payment due date, your policy will be cancelled for non-payment of premium at 12:01 AM on 08/07/1997[;] [¶] . . . [¶] Total amount due by 08/06/1997: \$94.33[;] [¶] . . . [¶] Return this portion with your payment[;] Due in our office by: 08/06/1997[;] [¶] . . . [¶] Coverage Period: 08/07/1997 to 09/07/1997[;] [¶] . . . [¶] Total amount due by 08/06/1997: \$94.33[;] [¶] . . . [¶] Insurance Premium Due Notice [¶] . . . Cancellation Notice If Premium Not Paid.”

Even though she received the notice, appellant did not make the payment due by August 6, 1997 or any further payments on the policy. On August 7, 1997, respondent cancelled the policy for nonpayment of the premium. No additional notice of cancellation was mailed to, or received by, appellant. Appellant was involved in a motor vehicle accident on October 7, 1997. Respondent denied coverage for claims arising out of such accident because the policy had been cancelled.

## II. STATEMENT OF ADDITIONAL FACTS

The parties also submitted declarations and documents obtained through discovery regarding the notices of cancellation mailed to, or received by, FCTT, the lienholder on the policy.

Appellant sent an “Amended Notice of Taking Deposition and Notice to Produce Documents” to then defendant Ray Cuevas. The notice required that Cuevas appear for a deposition with his “complete and original file or files” pertaining to appellant’s policy with respondent. At the deposition, Cuevas produced two documents regarding the policy which had been received by him as agent for appellant and FCTT. Respondent submitted these documents in support of its motion for summary judgment.

The first document was a notice of cancellation, dated August 17 or 19, 1997, and sent to “Loss Payee FCTT.” It states: “Cancellation Notice [¶] Cancellation or termination [of the policy for named insured, appellant] will take effect on August 29, 1997 at 12:01 A.M. You are hereby notified that the agreement under the loss payable clause to you as lienholder, which is part of the above policy, issued to [appellant], is hereby cancelled (or terminated) in accordance with the conditions of the policy, said cancellation (or termination) to be effective on and after the hour and date mentioned above.”

The second document was a request for information dated October 3, 1997 and sent to Cuevas on behalf of FCTT. It stated: “Dear Agent, [¶] We have recently received notification that [appellant’s insurance policy] has been canceled or expired effective 8/30/97. If our customer has reinstated, renewed, or replaced his insurance coverage on this leased vehicle, please fax a copy of the coverage verification to our Insurance Service Center . . . [¶] If you no longer provide insurance coverage for this customer, please advise us if you know where the coverage was transferred to by faxing this form with the information. [¶] . . . [¶] Your prompt reply will be appreciated. Thank you very much. [¶] Sincerely, [¶] [FCTT]”

In opposition to the motion for summary judgment, appellant submitted a declaration of Donald G. Nelson, the attorney who represented FCTT with regard to

collection of unpaid balances due and owing FCTT. Nelson averred that he “carefully reviewed” appellant’s file and did not find a notice of cancellation. Nelson was certain FCTT did not receive a notice of cancellation from respondent because “since 1980 it has been the custom and practice of [FCTT], upon receipt of a notice of cancellation from an insurance company, to immediately send to the borrower a letter advising the borrower of the borrower’s failure to maintain insurance, and to encourage the borrower to immediately procure new insurance or reinstate the former insurance.” No such letter was in the file.

### **III. DISCUSSION**

“Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. [Citation.] . . . [Citation.] In examining the supporting and opposing papers, the moving party’s affidavits or declarations are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. [Citation.]” (*Kaplan v. LaBarbera* (1997) 58 Cal.App.4th 175, 179.)

“Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment. [Citations.]” (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613.)

“In evaluating the propriety of a grant of summary judgment our review is de novo, and we independently review the record before the trial court. [Citation.]” (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. omitted.) “[T]his court may affirm summary judgment for reasons different from the trial court’s reasons. [Citations.]” (*Bunnell v. Department of Corrections* (1998) 64 Cal.App.4th 1360, 1367.)

Appellant alleged two causes of action against respondent: breach of an insurance contract and breach of the covenant of good faith and fair dealing. As a matter of law, neither of these causes of action has merit if the policy was terminated or cancelled

before the date of the accident involving appellant. (*Solomon v. North American Life and Cas. Ins. Co.* (9th Cir. 1998) 151 F.3d 1132, 1137.)

Cancellation of a policy for nonpayment of a premium is covered by several sections of the Insurance Code.<sup>1</sup>

Section 661, subdivision (a)(1) provides that an insurance policy can be cancelled for nonpayment of a premium. Section 661, subdivision (d) provides: “This section shall not apply to nonrenewal.” Section 662 provides in pertinent part: “No notice of cancellation of a policy to which Section 661 applies shall be effective unless mailed or delivered by the insurer to the named insured, lienholder, *or* additional interest at least [10] days prior to the effective date of cancellation . . . accompanied by the reason therefor . . . . [¶] This section shall not apply to nonrenewal.” (Italics added.) Section 663 covers a notice of nonrenewal.

Section 662.1 provides: “Proof of mailing or delivery of a notice of cancellation to a *lienholder or an additional interest* on a policy to which this chapter applies shall be sufficient to terminate the interest of the parties provided the notice is mailed or delivered at least the maximum number of days prior to termination of the parties’ interest as required by Section 662. For purposes of this section, ‘delivery’ includes electronic transmittal or facsimile or personal delivery. No *lienholder or additional interest* shall require a more restrictive form of notice.” (Italics added.)

Section 664 provides: “Proof of mailing of notice of cancellation, or of intention not to renew or of reasons for cancellation, to the *named insured* at the address shown in the policy or to the *named insured’s* latest known address, shall be sufficient proof of notice.” (Italics added.)

“[S]trict compliance with the terms of contractual requirements for notice of cancellation is essential to effect a valid policy cancellation. [Citation.] Similarly, compliance with a statutory mandate regarding transmittal of cancellation notices is

---

<sup>1</sup> All citations to a statute are to the Insurance Code.

required as well. [Citations.]” (*Lee v. Industrial Indemnity Co.* (1986) 177 Cal.App.3d 921, 924-925.)

The “Insurance Premium Due Notice; Cancellation Notice if Premium Not Paid” given by respondent to appellant was the only notice required to be given to appellant. No further notice to her was required. (*Monteleone v. Allstate Ins. Co.* (1996) 51 Cal.App.4th 509, 516; *Fujimoto v. Western Pioneer Ins. Co.* (1978) 86 Cal.App.3d 305, 313 & fn. 8; *Agalianos v. American Central Ins. Co.* (1923) 62 Cal.App. 349, 365-366.) It is undisputed that this notice was sent to, and received by, appellant and that appellant did not pay the premium.

Appellant’s principal argument is that the policy was not terminated as to her because the notice to lienholder FCTT was defective. Under the appropriate standard of review, the record indicates that a notice was sent to, and received by, FCTT.

In *Savarese v. State Farm Etc. Ins. Co.* (1957) 150 Cal.App.2d 518, 522, Division Two of this District dealt with a substantially similar issue as follows: “Cancellation of the policy as to [named insured/owner] was specified to be effective at 12:01 a.m., June 15, whereas the notice to the lien holder merely stated the date, and not the hour, of cancellation. The result is that the policy remained in effect as to the lien holder after its cancellation as to the owner. . . . Appellant contends that the policy cannot be cancelled as to the owner so long as it remains in effect as to the lienholder. But the courts have treated the rights of the owner and the ‘loss payee’ as independent [citations].” (See also *Lauman v. Springfield Fire etc. Ins. Co.* (1921) 184 Cal. 650, 653 [notice to mortgagor does not cancel policy as to mortgagee]; *Hoffman v. Citadel General Assurance, Ltd.* (1987) 194 Cal.App.3d 1356, 1362-1363 [policy cancelled when proper notice to insured by bank even though no notice to company].)

*Savarese* expresses the rule generally prevailing throughout the United States. “[A]n insurer has separate obligations to notify the insured and the mortgagee of cancellation of a fire insurance policy. See *Rawl v. American Cent. Ins. Co.*, 94 S.C. 299, 303, 77 S.E. 1013 (1912) (mortgagee entitled to notice of cancellation of policy). In other jurisdictions, cases bringing before courts a valid notice to an insured or mortgagee,

but not to both, have held the notice valid against the party who received it. For example, *Standard Fire Ins. Co. v. United States*, 407 F.2d 1295, 1300-1301 (5th Cir. 1969) (cancellation effective as to the insured who received notice, but not as to the mortgagee); *Aetna State Bank v. Maryland Cas. Co.* [N.D.Ill. 1972] 345 F.Supp. [903,] 905-906 (no notice to mortgagee); *Boon v. Arkansas Farmers Mut. Fire Ins. Co.*, 224 Ark. 618, 622, 275 S.W.2d 436 (1955) (no notice of cancellation given to mortgagee, and the policy in full force as to him, even though mortgagee became sole owner of the premises before a fire occurred); *Savarese v. State Farm Mut. Auto. Ins. Co.* [*supra*,] 150 Cal.App.2d 518, 522, 310 P.2d 142 [] (cancellation effective as to insured, but not as to mortgagee); *National Security Fire & Cas. Co. v. Mid-State Homes, Inc.*, 370 So.2d 1351, 1353-1354 (Miss.1979) (notice to owner and not to mortgagee entitles mortgagee to collect insurance proceeds because the obligations are separate); *Seeburger v. Citizens Mut. Fire Ins. Co.*, 267 Wis. 213, 218-219, 64 N.W.2d 879 (1954) (notices were effective as to owner, but not as to mortgagee to whom they were not mailed). Compare *Wisconsin Barge Line, Inc. v. Coastal Marine Transp. Co.*, 285 F.Supp. 264, 273 (E.D.La.1968) (failure to notify all owners); *Fifty States Management Corp. v. Public Serv. Mut. Ins. Co.*, 67 Misc.2d 778, 784, 324 N.Y.S.2d 345 (N.Y.Sup.Ct.1971).” (*Pierce v. Sentry Ins.* (Mass.App. 1981) 421 N.E.2d 1252, 1254-1255.)

We see no reason to depart from the prevailing rule. Both the Insurance Code and the policy emphasize that the protected interests and notice requirements of the named insured and lienholder are separate.

Sections 661 and 662 set out the general principle that a policy of insurance can be cancelled for nonpayment of premium by a timely notice of cancellation to the named insured, lienholder or other insured covered by the policy. Because section 662 uses the disjunctive word “or,” the statute indicates that each of the three entities has a separate insurable interest. (*Estate of Pittman* (1998) 63 Cal.App.4th 290, 298.)

The Insurance Code continues the disjunctive pattern. Section 662.1 governs how delivery of the appropriate notice to a “lienholder or an additional interest on a policy” is

proved. Section 664 governs how delivery of the appropriate notice to the “named insured” is proved. Each interest is covered in a different section.

The policy also has separate provisions controlling cancellation of the interests of the named insured and of the lienholder. Under the heading “Cancellation or Non-Renewal,” the policy directly addresses the named insured (appellant) and describes the procedure for canceling her policy for nonpayment of a premium. A totally distinct division of the policy entitled “Loss Payable Clause” covers the rights of a lienholder and cancellation of the lienholder’s interest.

Accordingly, respondent was not liable to appellant because under the Insurance Code, case law and policy, appellant’s insurance with respondent was properly cancelled before the date of the accident by her failure to pay the premium due on August 6, 1997, after the “Insurance Premium Due Notice[;] Cancellation Notice if Premium Not Paid” was timely mailed to her.

#### **IV. DISPOSITION**

The judgment is affirmed. Costs are awarded to respondent.

---

Reardon, J.

We concur:

---

Kay, P.J.

---

Sepulveda, J.